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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001553-MR

KERRY ALAN WATTERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 05-CR-000388

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; AND KNOPF,¹ SENIOR
JUDGE.

KNOPF, SENIOR JUDGE: The single issue in this appeal is the adequacy of the trial court's remedy for a discovery violation by the Commonwealth. Appellant Kerry Watters asserts that he suffered a due process violation when the trial court refused to grant a continuance or to disqualify a prosecution witness whose contact information was not

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

timely disclosed. Because we are convinced that Watters suffered no prejudice by the trial court's decision, we affirm.

Watters was indicted for allegedly throwing a pan of boiling water on Richard Crute, a co-worker at the Bristol Bar and Grill in Louisville, Kentucky. The pair were apparently engaged in an on-going dispute concerning Crute's failure to pay a parking ticket he received while driving Watters' car. Crute testified that as he was working at the kitchen grill on the evening of November 22, 2004, he felt something hit him in the back. He stated that as he turned around, Watters began hitting him with a pot shouting "Give me my money." Crute testified that as he screamed in pain from the burns on his back, other employees came into the kitchen and pulled Watters off of him. The restaurant manager, Pete Peters, immediately took Crute to the hospital where he remained in the burn unit for approximately two months.

Although he admits there was an altercation concerning the parking ticket, Watters denied throwing water on Crute. Watters' version of the fight has Crute striking the first blow and Watters acting in self-defense. Watters maintains that in the course of the struggle in the confined space of the kitchen, Crute's burns must have been sustained when kitchen equipment was knocked to the floor. Watters stated that he picked up a pot from the floor, hitting Crute with it only once before other employees came into the kitchen and broke up the fight. He insists that there was no water in the pot when he hit Crute.

The witness whose testimony is the focus of this appeal is Matthew Kaufman, another Bristol employee. He testified that he was standing just inside the kitchen door talking with another employee when movement caught his eye. Kaufman stated that he then saw Watters come up behind Crute, pour a pot of water on him and then continue hitting him with the pot until Crute's screams caused other employees to intervene.

At a pre-trial hearing on the morning of trial, defense counsel argued that in addition to the grounds advanced in a previously filed motion for a continuance, the prosecutor had just informed her that morning of two additional witnesses: the restaurant kitchen manager, Darryl LaPradd, and Kaufman. Counsel stated that it was her understanding that Kaufman was an eyewitness and, while the prosecutor had not talked to Kaufman, the prosecution had subpoenaed him and therefore had contact information it had not provided in discovery. Counsel informed the court that she wanted a continuance in order to interview Kaufman and stated that she thought a “minimal continuance” would suffice. The prosecutor opposed a continuance primarily because he had secured the attendance of the victim after a previous continuance had been granted to bring Crute from Virginia where he was incarcerated on a conviction in that commonwealth.

As to the failure to produce contact information on Kaufman, the prosecutor stated that he did not know where Kaufman was, that he had never met him and that, although he had subpoenaed him, he had not been able to contact him as his

phone had been disconnected. In response to the judge's question about the return on the subpoena, the prosecutor noted that he had checked the sheriff's website which showed that Kaufman had been served at his last known address. The prosecutor stated that he did not know where Kaufman was and that, without conceding anything in regard to the motion for a continuance, he was willing to proceed without Kaufman's testimony.

Defense counsel responded that because the prosecution had an address for Kaufman, it should have been provided and that the defense was entitled to talk to him, "to find out what he has to say." The trial court subsequently denied the motion for a continuance, informing defense counsel that if Kaufman showed up to testify, it would insure that she had sufficient opportunity to talk with him about his testimony before the Commonwealth put him on the stand. The pre-trial hearing was continued after lunch at which time defense counsel renewed her motion for a continuance and, alternatively, asked the trial court to exclude Kaufman's testimony or any mention of him, citing RCr 7.24, 7.26, JRP 603 and *James v. Commonwealth*, 482 S.W.2d 92 (Ky. 1972). After the trial court pointed out that that Kaufman's name had been listed in the Commonwealth's discovery response, the prosecutor stated that it was only the contact information that had been inadvertently omitted and that he himself had tried without success to contact Kaufman.

The trial court thereafter ruled that there had been no intentional discovery violation and that, while it did appear that Kaufman had been served with a subpoena, he had failed to appear for trial. The court again emphasized that if Kaufman did appear, he

would not allow the Commonwealth to put him on the stand until after defense counsel had been given an opportunity to interview him. He then denied the motion to exclude Kaufman's testimony.

The following morning, defense counsel reported to the court that she had just been advised that the prosecutor had spoken with Kaufman the night before and intended to call him as a witness. Defense counsel acknowledged that it did not appear that the prosecutor had engaged in any willful misconduct, but that a discovery violation had nevertheless occurred, thus requiring exclusion of Kaufman's testimony. In response, the prosecutor informed the court that Kaufman had called his office the previous day and left his telephone number. As soon as the prosecutor was informed about this, he called Kaufman and left messages for him to call back. Kaufman finally called the prosecutor at his home about 7:45 p.m. This was the first time that the prosecutor had spoken with Kaufman. Kaufman told the prosecutor that he had been mistaken about the date he was to appear, that he would appear the next day, and that he would testify that he saw Watters throw a pan of boiling water on Crute. In addition to reiterating his opposition to a continuance, the prosecutor stated his opinion that exclusion was not necessary since there was no deliberate prosecutorial misconduct and the trial court was affording defense counsel an opportunity to interview Kaufman before he took the stand.

The trial court ultimately denied the motions for a continuance and to exclude Kaufman's testimony. Later that day, after voir dire and direct examination of the victim, and that of Dr. Raymond Orthober who testified as to the extent of the victim's

injuries, defense counsel was permitted to interview Kaufman on the record outside the presence of the jury. The jury was excused for the day and Kaufman was questioned as if by deposition on a tape separate from the trial tape. When trial resumed the following day, Kaufman was the Commonwealth's first witness.

After the jury found him guilty of assault under extreme emotional disturbance, Watters filed a written motion for a new trial listing as error the failure to grant a continuance regarding Kaufman's testimony and the failure to exclude him as a witness. The denial of that motion precipitated this appeal.

Rcr 7.24(9) provides:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, **the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.**

[Emphasis added.]

It is clear to us that a trial court is afforded considerable discretion under the plain language of this rule. By its own terms, the rule contemplates the fashioning of other remedies to address discovery violations. Review of the record in this case convinces us that the trial court did not abuse its discretion in its handling of the inadvertent discovery omission. The defense counsel's opportunity to question Kaufman before trial was preserved, and she was able to adequately challenge his testimony when he took the

stand. Thus, we cannot agree with Watters that he was deprived of his Sixth Amendment right to counsel.

This is particularly true when Kaufman's testimony is viewed in the totality of evidence introduced in Watters' trial. While it may be that Kaufman provided the only eyewitness testimony contradicting Watters' version that Crute was unintentionally burned in the course of their altercation, there was other substantial circumstantial evidence from which the jury could conclude that Watters had indeed surprised Crute by throwing boiling water on his back as he worked at the grill. Not only do we find Crute's own testimony sufficiently supports the jury's determination, there was also substantial evidence in the form of testimony of other employees who ran back into the kitchen when they heard Crute's screams. As we stated in *McRay v. Commonwealth*, 675 S.W.2d 397, 400 (Ky.App. 1984):

It is apparent that failure to comply with RCr 7.26 does not require automatic and absolute reversal. Some prejudice must be found; otherwise, the error, if any, is harmless.

No prejudice can be gleaned from the record in this case. Upon our review, we are convinced that there is no reasonable probability that the result of Watters' trial would have been different had Kaufman's testimony been excluded. Thus, we cannot conclude that he suffered any due process deprivation by the trial court's handling of an inadvertent failure to provide contact information for a potential witness identified on the prosecution's discovery list.

Finally, we find Watters' insistence that JRP 603 requires a continuance or exclusion unavailing. As he admits in his brief, JRP 603(g) provides that anything not divulged according to discovery guidelines “may be suppressed unless good cause is shown, or in the alternative, **the Court may enter such other order as may be just under the circumstances.**” [Emphasis added.] We defer to the trial court's assessment that the remedy he fashioned was “just under the circumstances” and was sufficient to remedy the prosecution's inadvertent omission of contact information.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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